SPECIAL COMMUNICATION

Recent developments in tobacco litigation: 1991

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Abstract

Litigation has become a major front in the conflict between tobacco control forces and the tobacco industry. In 1991 there were important developments in six quite different tobacco lawsuits. An Australian judge ruled that the tobacco industry's claims that environmental tobacco smoke has not been proven to cause a variety of diseases were false and misleading. A US convenience store chain agreed to demand proof of age before selling tobacco products to young people. A Quebec judge ruled unconstitutional the Canadian law banning tobacco advertising. A product liability suit was filed against cigarette manufacturers by airline flight attendants whose health was impaired by exposure to environmental tobacco smoke. Another product liability suit, charging that asbestos contained in a cigarette filter caused the plaintiff's mesothelioma, ended inconclusively. Finally, the US Supreme Court prepared to decide a legal issue of critical importance to the viability of tobacco products liability cases in the United States. These cases illustrate the range and importance of tobacco control issues now being considered by the courts.

Introduction

The dominant paradigm of the worldwide effort to control the diseases associated with tobacco use has shifted dramatically from scientific inquiry into causation[1] to a multifront war with the tobacco industry.[2] Every significant public health effort to limit tobacco use or exposure to tobacco smoke – whether providing clear information to smokers and potential smokers, protecting non-smokers, raising taxes, reducing cigarette flammability, or whatever – seems to produce a counterthrust from the tobacco industry. Pro-health forces, having gradually realised that the usual price of ignoring tobacco industry sniping is the failure of their tobacco control efforts, have turned their sights on the industry itself. The new paradigm is characterised by public exposure of the industry's marketing, public relations, and lobbying techniques in an effort to reduce its political power to block tobacco control initiatives.

The courts provide a useful forum in which to attack the tobacco industry and diminish its ability to cause harm. Tobacco lawsuits attract wide media attention, educating the public on the range of tobacco caused diseases and conditions and publicly exposing the evidence of irresponsible tobacco industry behaviour unearthed by plaintiffs' attorneys. Furthermore, the courts themselves frequently have the power to enjoin unfair or deceptive marketing techniques, as well as to award monetary damages which could force the industry to raise prices. Unfortunately, courts can also be used by the tobacco industry as an additional avenue for attacking tobacco control initiatives.

In 1991 there were important developments in six cases, each of which exemplifies a different use of litigation in the tobacco control struggle. Three of these cases involve tobacco marketing practices. In two of them public interest groups successfully used the courts to attack some of these practices. In the *Australian Federation of Consumer Organisations v Tobacco Institute of Australia* (*AFCO*), an Australian Federal Court judge enjoined the Tobacco Institute from claiming that environmental tobacco smoke has not been scientifically proven to cause lung cancer, asthma attacks, and respiratory disease in children. In *Kyte v Store 24 Inc* (*Kyte*) a test case brought by two advocacy groups based in Massachusetts against a chain of convenience stores was settled, with the stores agreeing to require proof of age before selling tobacco products to young people. In the third case, however, cigarette manufacturers were successful in using judicial action to protect their marketing practices. A Quebec trial judge in *RJR-MacDonald Inc v Attorney General of Canada* (*RJR-MacDonald*) invalidated the landmark Canadian law banning tobacco advertising and requiring dramatic package warnings. Both the *AFCO* and *RJR-MacDonald* cases are on appeal.

The remaining three cases seek to use product liability law both to compensate tobacco victims and to achieve public health objectives. In *Broin v Philip Morris Inc* (*Broin*) a legal action was begun on behalf of seven non-smoking flight attendants, including one who developed lung cancer allegedly as a result of her 13 years of exposure to environmental tobacco smoke in airline cabins. These named plaintiffs also seek to represent approximately 60000 other non-smoking flight attendants who were similarly exposed. In *Ierardi v Lorillard Inc* (*Ierardi*) a jury did not reach the plaintiff's claim that crocidilite asbestos in the Kent Micronite filter between 1952 and 1956 caused his mesothelioma, since it did not believe he smoked Kents during that period.

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And in *Cipollone v Liggett Group Inc* (*Cipollone*) the United States Supreme Court agreed to review, received briefs on, and heard initial arguments on the question whether the Federal Cigarette Labeling and Advertising Act of 1965 prevents (pre-empts) juries from even considering liability claims based on the cigarette companies' failure to give adequate warnings and on other deceptive industry conduct after 1965.

Australian Federation of Consumer Organisations v Tobacco Institute of Australia (AFCO)

In July 1986 the Tobacco Institute of Australia (TIA) ran full page advertisements in newspapers throughout Australia designed to slow the momentum of the non-smokers' rights movement by casting doubt on the developing consensus that environmental tobacco smoke (ETS) harms non-smokers. The advertisement claimed that "there is little evidence and nothing which proves scientifically that cigarette smoke causes disease in non-smokers." The tobacco industry had previously made the same claim in advertising in the United States.[3]

The Australian Federation of Consumer Organisations (AFCO) reacted promptly to the Australian advertisements by complaining to the Trade Practices Commission that the claim was misleading or deceptive. TIA responded by undertaking to publish a follow up advertisement which neither repeated nor retracted the original claim but left the reader with the same overall impression. The commission was satisfied with this response, but AFCO sought an undertaking from TIA that it would not repeat the original claim. When TIA refused to make this commitment AFCO sued it in federal court, seeking the same result through an injunction under the Trade Practices Act.

Under both Australian and US law public interest groups can complain about misleading or deceptive marketing practices to a federal administrative agency, which has power to order the advertiser to cease the offending behaviour and even to take other corrective action. This power was exercised by the US agency, the Federal Trade Commission, in the case of another industry public information advertisement which sought to cast doubt on the connection between active smoking and heart disease: the commission ordered the tobacco company to cease making that claim or similar claims without adequate scientific support.[4] It took no action, however, with respect to the advertisement regarding non-smokers' health. US consumers, unlike Australian ones, are not permitted by law to seek a judicial injunction.

AFCO's legal action provoked an extraordinary – and extraordinarily expensive – legal action. The court heard testimony and arguments for 90 days. The Australian experts for both sides and the statisticians, physicians, and toxicologists whom TIA brought in from the United States, Britain, and Sweden were heard in Sydney; the court then moved to London, England, to hear epidemiological evidence on behalf of the plaintiff by Sir Richard Doll and Professors Nicholas Wald, Dimitrios Trichopoulos, and Dwight Janerich. Defending the case is estimated to have cost TIA $A5 million; AFCO was assisted by some legal aid from the Federal Minister for Justice and Consumer Affairs, as well as by the forbearance of its attorneys and expert witnesses, who will be paid by TIA if AFCO continues to prevail on appeal.[5]

Justice TR Morling, who sat without a jury, handed down his landmark 211 page ruling on 7 February 1991. His opinion analysed the available scientific evidence, including the expert testimony on both sides. He found that "there is compelling scientific evidence that cigarette smoke causes lung cancer in non-smokers," that "there is overwhelming evidence... that passive smoking causes some people to experience attacks of asthma," and that "the evidence establishing a causal relationship between passive smoking and respiratory disease in very young children is overwhelming. The evidence is of such strength that it constitutes scientific proof." He noted that the industry was unable to bring forth a single epidemiologist to contradict AFCO's witnesses, and he was critical of the witnesses who and the testimony that it did bring forth. Justice Morling ordered that TIA be restrained from republishing the advertisement or from making the contested claims.[6]

The *AFCO* decision has had an immediate and dramatic effect on passive smoking in Australia. It has greatly heightened employers' concerns about legal liability for allowing employees to be exposed to ETS, leading many to ban smoking in their workplaces,[7] and it has inspired serious governmental considerations of strong measures limiting public smoking.[8] The *AFCO* decision may also end the industry's worldwide public relations practice of arguing that no court has ever found that ETS causes harm to non-smokers.

Kyte v Store 24, Inc (Kyte)

Although 45 of the 50 states in the United States have legislation banning the sale of cigarettes to minors, these statutes are almost never enforced, with the result that children and teenagers can purchase cigarettes almost wherever they want. The official, criminal enforcement process requires that the police take action against the offending store owners; but the police almost always feel they have more important things to do.

Two public health advocacy groups, the Group Against Smoking Pollution (GASP) of Massachusetts and the Tobacco Products Liability Project (TPLP), decided to test whether the civil legal process might be more effective. The promise of this strategy was that it avoided relying on reluctant police, drew on state consumer protection acts which permit successful plaintiffs to recover their attorneys' fees, and presented store owners with the probability of substantial legal defence costs

and adverse publicity, giving them a strong incentive to settle.

In April 1987 a test case was filed on behalf of two teenagers, Theresa Kyte and Sean Cann, who had been buying cigarettes principally from Store 24 outlets for several years. The suit alleged that the youngsters had become addicted to nicotine, were suffering from minor ailments, and were at greatly increased risk of developing smoking related lethal diseases. The suit claimed that Store 24 Inc had violated the state consumer protection act just by selling cigarettes to minors, that by selling to minors it was maintaining a public nuisance, and that it had violated various common law duties to its customers, including the negligent entrustment of a dangerous instrumentality to a minor, failure to warn of special dangers which cigarette smoking poses to minors, and breach of warranty through sale of an unreasonably dangerous product.[9]

The suit also named Philip Morris Inc, the manufacturer of the Marlboro and Parliament cigarettes which the plaintiffs smoked, on the theory that it had made special efforts to promote its cigarettes to minors, that it had in effect conspired with the retailers in a scheme to market cigarettes to minors, and that it had a legal responsibility – which it had breached – to see that retailers did not sell its products to minors. Though promising in theory, the decision to include the manufacturer in the suit proved a tactical mistake, since much of the next three years was spent in an inconclusive battle with a powerful adversary which would never settle and was, in any event, marginal to the strategy. Following a Massachusetts Supreme Judicial Court decision granting judgment to Philip Morris Inc on several of the claims against it, the plaintiffs' attorney dismissed the tobacco company from the case in September 1990, simplifying the case and facilitating the settlement against Store 24 Inc.

An initial legal victory against Store 24 Inc set the stage for the ultimate settlement with the chain. In September 1987 a judge ruled that proof of sale to a minor would constitute a violation of Massachusetts's consumer protection act, enabling the plaintiffs to recover attorneys' fees if successful.[10] Since the plaintiffs' attorney had already given Store 24 Inc copies of photographs taken of one of its employees selling cigarettes to one of the underage plaintiffs, this ruling put the firm's executives on notice that they would probably end up paying both sides' legal bills for any delaying tactics for which they were responsible.

In June 1991 a settlement was reached with Store 24 Inc. Though many of the terms were and continue to be confidential, GASP and TPLP were able to announce that the retail chain had agreed to obtain positive age identification before selling tobacco products to young patrons and to adopt internal training and enforcement measures to prevent violations by employees in its 107 stores. None of these provisions are explicitly required by the statute, and all of them are necessary for a successful programme. This is the first agreement of this kind ever reached and marked a successful conclusion of this test case.

The suit attracted some national publicity when it was filed, and very substantial publicity when the settlement was announced. Trade journals for the retailing industry have paid particularly close attention to the case, with the result that retailers nationwide are aware of the available legal theories and of the fact that a major convenience store chain has settled.[11] Newspaper stories about the settlement include a statement from a spokesperson for the convenience store association that the settlement confirms the importance of educating clerks not to sell to minors,[12] and signs announcing an intention not to sell tobacco products to minors have proliferated in Massachusetts stores.

RJR-MacDonald Inc v Attorney General of Canada (RJR-MacDonald)

In 1988 the Canadian Parliament passed the landmark Tobacco Products Control Act (the TPCA), which bans most forms of cigarette advertising, requires strong and conspicuous warning labels on packages, and permits the government to take even stronger measures in the future. While dramatic increases in tobacco tax during the same period probably deserve most of the credit, tobacco consumption per head in Canada fell by a quarter in the $2\frac{1}{2}$ years after the TPCA's implementation in January 1989.

RJR-MacDonald Inc and Imperial Tobacco Limited responded to the TPCA by filing a lawsuit against the government in Montreal, Quebec, seeking a declaration that the act was unconstitutional and an injunction against its enforcement. The companies claimed that the federal government's adoption of the TPCA had improperly trenched on provincial powers and that the TPCA impinged on the freedom of speech protected by the Canadian Charter of Rights and Freedoms. Rothmans and Benson and Hedges Inc, another major Canadian cigarette producer, filed a similar action in Ontario but stayed that action pending the result in the Quebec case.

The trial in the case, before Quebec Superior Court Judge Jean-Jude Chabot, lasted nine months. The government had the burden of demonstrating that the advertising ban was reasonable, which involved showing that the presence or absence of cigarette advertising affects – or is likely to affect – consumption rates and that reducing cigarette smoking is a health objective of great importance. Both sides produced experts on the purposes and effects of advertising in general, and cigarette advertising in particular. In addition, the government adduced evidence from the tobacco companies' files that they engaged in intensive studies of adolescent psychology and that various cigarette advertising campaigns were addressed to people of 16 or even younger; other cigarette advertising campaigns were designed to reassure concerned smokers that "it is alright to smoke."[13] Finally, the

government submitted uncontested epidemiological testimony, beginning with that of Sir Richard Doll, as to the nature and extent of the devastation wreaked by tobacco use.

On 26 July 1991 Judge Chabot handed down his 140 page opinion invalidating the TPCA on both jurisdictional and free speech grounds. The opinion, written in French, is a masterpiece of illogicality.[14] Thus, while the judge accepts that protecting the health of Canadians comes within federal jurisdiction, he "cannot accept... that the true purpose of the TPCA is the problem of tobacco use. The true purpose of the Act is the control of advertising and promotion of a particular product, tobacco." In effect, he views these purposes as contradictory rather than appreciating that controlling tobacco advertising and promotion was chosen as a means of dealing with the problem of tobacco use.

Similarly, Judge Chabot recognises that the cigarette manufacturers' right to free expression under the Canadian Charter of Rights and Freedom is "subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" and that "the struggle against tobacco use constitutes a sufficiently important objective in a free and democratic society such as ours to justify a restriction on a freedom guaranteed by the Charter."[15] He also quotes at length from *Irwin Toy Ltd v AG Quebec*, in which the Canadian Supreme Court approved a ban on all commercial advertising aimed at young children,[16] and from *Rocket v Royal College of Dental Surgeons*, in which that court approved restrictions on advertising by dental surgeons.[17]

None the less, Judge Chabot proceeds to treat the cigarette advertising ban as if eliminating certain types of commercial appeals because of their deleterious effects were an unprecedented means of "social engineering" – indeed, a "form of paternalism or totalitarianism... unacceptable in a free and democratic society such as ours." He views the fact that "tobacco is a product in common use" as somehow supporting the conclusion that governmental control of tobacco advertising impinges on the "human dignity" of nearly 6700000 Canadians who use tobacco, whom he "cannot ignore... in weighing the values at issue in this case."

A smoker himself, Judge Chabot denigrates the scientific evidence which the government adduced as to the health consequences of smoking: "Although there would have been much to say about certain exaggerations, not to say enormities and generalizations unworthy of a truly scientific mind, offered by some of the experts heard during the trial, this is not the issue." Not surprisingly, then, he refuses to equate messages which promote smoking with "messages which promote violence or hatred or which are false," all of which he concedes the government may ban.

Judge Chabot views certain pragmatic compromises in the TPCA, such as exempting cigarette advertising in foreign periodicals, as "logical weaknesses" vitiating the rational connection between legislative objective and means adopted. Most importantly, he rejects entirely the validity of the evidence adduced by the Attorney General for a causal connection between cigarette advertising and cigarette consumption, including the report of the New Zealand Toxic Substances Board in May 1989, which examined the effects of cigarette advertising bans in various countries and concluded that they did reduce consumption, and an econometric analysis by Professor Jeffrey Harris, which came to the same conclusion. He notes instead that the "virtual totality of the scientific documents in the State's possession at the time the Act was passed do not demonstrate that a ban on advertising would affect consumption," and he never makes the commonsense observation that, even without econometric proof, massive cigarette advertising expenditures can be presumed to have some effect on overall consumption.[18] Given this, his conclusion inevitably follows that the "total ban on advertising is out of all proportion to the objective," and hence unconstitutional.

Judge Chabot stayed his decision pending appeal, leaving the TPCA still in effect in Canada. The federal government promptly appealed to the Quebec Supreme Court, and may very well appeal from there to the Canadian Supreme Court if necessary. While Judge Chabot's ruling may not survive the appellate process, it can certainly do substantial mischief in the meantime, both by discouraging vigorous enforcement of the TPCA and by discouraging other nations from following Canada's courageous example.

Fortunately, Judge Chabot's is not the only judicial pronouncement on the constitutionality of tobacco advertising bans. In 1986 the US Supreme Court opined in *Posadas de Puerto Rico Assoc v Tourism Co of Puerto Rico* that "[l]egislative regulation of products or activities deemed harmful, such as cigarettes, alcoholic beverages, and prostitution" involving "legalisation of the product or activity with restrictions on stimulation of its demand" would not be unconstitutional.[19]

Broin v Philip Morris Companies Inc (Broin)

To date, almost all tobacco products liability cases have been brought on behalf of smokers or their survivors. Typically, the smoker suffered from lung or laryngeal cancer, emphysema, Buerger's disease, or peripheral vascular disease. The strength of these cases is that these diseases are predominantly caused by smoking, the tobacco industry knew about them long before the first warnings appeared, the smokers generally started smoking in their teens and before the government imposed health warning in 1966, and most were addicted by the time of the Surgeon General's first report. The weakness of these cases is that the smokers generally kept smoking even after the warnings, which millions of other smokers heeded.[20]

Non-smokers' tobacco liability cases present

a very different mix of strengths and weaknesses. The principal attraction of these cases is that it is much harder to blame the victims of ETS for their continued exposure than it is to blame smokers. Furthermore, a clear warning by the tobacco companies – or even merely abandoning their policy of massive resistance exemplified by the advertisements in the *AFCO* case above – would undoubtedly have caused employers, landlords, and legislatures to respond earlier and more completely to the ETS threat, thereby preventing some of the ETS induced diseases which have actually occurred. On the other hand, the relative risks of contracting lung cancer or heart disease for non-smokers exposed to ETS are less than 2,[21] it is less certain that the tobacco companies knew of these risks before the early 1980s, and smokers might not have heeded a warning about their smoking harming other people even if the tobacco companies had given it.

In October 1991 two attorneys in Miami, Florida – a solo practitioner who had represented airline flight attendants against their employers in workers' compensation cases and the senior attorney in a small but successful personal injury practice – filed a class action on behalf of all non-smoking flight attendants who had been exposed to ETS in the course of their employment. Though smoking was banned on practically all domestic US flights in February 1990, it had been permitted on all flights before 1988, had been permitted on many flights between then and 1990, and is allowed on most international flights even today.

The complaint named seven current or former flight attendants as representative plaintiffs.[22] The first named plaintiff, Norma Broin, was diagnosed as having adenocarcinoma of the lung in 1989 at the age of 32, following 13 years of exposure to ETS as an American Airlines flight attendant. One lung was removed, and she is presently in remission. The other six named plaintiffs are suffering from less serious conditions.

The class which they are claiming to represent, all exposed US flight attendants, is obviously heterogeneous with respect to their ETS related health status. While many are doubtless suffering from a wide range of conditions, most of those who are not currently being exposed probably do not presently have any ETS related health problems. That does not mean, however, that they have no viable legal claims. Many of them were suffering from acute, if minor, problems caused by ETS at the time they were being exposed, and they could recover modest damages for the period of this suffering that is within the statute of limitations. Furthermore, all of them are at increased risk of lung cancer as a result of their exposure to ETS: under developing case law it is at least possible that flight attendants who fear that they will develop lung cancer may be able to recover from that fear.

It is far from certain that the case will be permitted to proceed as a class action, especially where the class is defined broadly to include all exposed flight attendants. Class actions are permitted only where "common questions of law or fact" predominate over issues specific to individual plaintiffs. Courts have been reluctant to permit class actions to proceed in personal injury cases on the theory that the details of exposure, injury (if any), and resulting damages (if any) vary. But the questions common to all plaintiffs are at least equally important and difficult. The tobacco companies will argue that they did nothing wrong, that ETS has never been proven to cause medical problems of any sort (*AFCO* to the contrary notwithstanding), that product liability law does not protect bystanders, that federal law pre-empts their obligation to warn, that the independent actions of the airlines and the smokers were intervening causes which precluded industry liability, and that a complete warning would not have substantially reduced ETS concentrations in airplane cabins, as well as contesting the facts specific to each plaintiff. While strong responses are available with respect to each of their generic defences, these common issues will obviously occupy a large proportion of the attorneys' and judges' time on this case.

Even if the action is not permitted to proceed on behalf of the entire class of exposed airline attendants, it may be allowed for a smaller class – for example, all exposed flight attendants with specific ETS related symptoms or all flight attendants with more than some specified length of exposure to ETS who have expressed a fear of developing lung cancer. In any event, it could proceed in the form of joined individual actions on behalf of the named plaintiffs, subject to the resolution of the generic and plaintiff specific defences which the tobacco companies will assert.

Aside from the questions relating to the class action procedure, the most difficult problems in this and future product liability actions based on ETS are likely to involve causation. Some specific incidents and conditions, such as asthmatic attacks and irritation of the eyes and the nasal passages, may be definitely linked to ETS exposure, but these generally do not produce the large monetary damages needed to justify the cost of product liability actions. There have been many reports of ETS exposure permanently exacerbating allergic conditions, but the scientific status of some of these assertions is in dispute. The potential for ETS to exacerbate respiratory impairments is better established, and in some cases could support a judgment for substantial monetary damages.

The largest potential recoveries would likely be for ETS induced lung cancer or heart disease. Both of these claims, however, raise the hotly disputed legal question whether a plaintiff whose exposure to a toxin carries a relative risk between 1 and 2 can meet his burden of proving that the toxin caused his illness. Furthermore, even if courts allow juries to consider these causal claims, plaintiffs' counsel may often find it difficult to prove to the satisfaction of jurors that ETS was a substantial contributing cause.

Ierardi v Lorillard Inc (Ierardi)

In 1950 the first studies were published strongly linking cigarette smoking to lung cancer. As a result, many Americans stopped smoking in the early 1950s. In an effort to keep existing customers and attract customers from their competitors, cigarette manufacturers introduced filter cigarettes which they marketed as a safe (or at least safer) alternative to unfiltered cigarettes. Lorillard was particularly successful with its new Kent Micronite filters, which it advertised as "a pure, dust-free completely harmless material" which "offers you the greatest health protection in cigarette history." From its introduction in 1952 until its composition was changed in 1956 the Kent Micronite filter was made with crocidilite asbestos.

According to his testimony, Peter Ierardi began purchasing Kent cigarettes at the air force base exchange (store) where he was stationed in 1953, switching from Kool cigarettes at least in part to protect his health. In November 1989 Ierardi discovered that he had contracted mesothelioma, a lethal form of cancer caused by inhalation of asbestos. He was 56 years old, and the doctor told him he had only two or three years to live. A year later Ierardi filed a complaint in a Pennsylvania federal district court against Lorillard, the manufacturer of Kent cigarettes, and the Hollingsworth and Vose Company, which designed and produced the Kent Micronite filter.[23] Ierardi asserted that Lorillard knew or should have known that its Kent Micronite filters were "inherently defective, ultrahazardous, dangerous, deleterious, poisonous, and otherwise harmful," and that it not only failed to warn of the cigarettes' dangers but actively misrepresented them as safe; he sought both compensatory and punitive damages.

The two Philadelphia attorneys who represented Ierardi have also filed cases on behalf of four other former Kent smokers who have mesothelioma, and they have been contacted by many others. Like the non-smokers' ETS case, these Micronite filter cases benefit from the fact that Lorillard cannot employ its traditional defence that the smoker knowingly assumed the health risk when he began smoking. After all, Kent smokers had no idea that the cigarettes they purchased contained asbestos. Furthermore, the discovery process unearthed documents showing that Lorillard learned from tests in 1954 that asbestos was escaping from the Micronite filters but did not remove asbestos from the product until 1956.

At the three week trial in Philadelphia's Federal District Court the plaintiff's attorneys introduced more than 200 slides made in 1954 by a Lorillard consultant which showed crocidilite asbestos coming through the Micronite filter. They introduced evidence from a laboratory which in 1991 tested a package of Kent cigarettes with the original Micronite filter: again, the asbestos came loose. They presented evidence from a pulmonologist and a pathologist, both of whom testified that Peter Ierardi's mesothelioma was caused by the asbestos in the Micronite filter.

The defendants presented the testimony of the inventor of the Micronite filter and a physician for Cape Asbestos, which mined the asbestos used in the filter. Both testified that there was not enough asbestos coming out of the filter to cause mesothelioma. But their winning argument had nothing to do with whether the Kent Micronite filter could or did cause disease in smokers. Rather, they presented testimony that Kent cigarettes were not sold at the base exchange where Peter Ierardi was stationed and that Kool filter cigarettes (from which Ierardi claimed to have switched to Kents) were not sold until 1956, the year the asbestos was removed from the Kent Micronite filters.

The jury never got past the first question: did the plaintiff smoke Kent cigarettes with the asbestos containing Micronite filter? In the face of his unconvincing testimony about when he smoked which brand of cigarette, it concluded that he had not carried his burden of proof on this point and answered the question, "No." The potential for Micronite filter liability cases therefore still remains to be tested.

Cipollone v Liggett Group Inc (Cipollone)

The longest running saga in tobacco litigation is *Cipollone v Liggett Group Inc*. The case was begun in 1983 by Rose Cipollone, a smoker for 40 years who was dying from lung cancer, was continued by her husband after she died the following year, and is now being pursued by their son following the husband's death in 1990. *Cipollone* has already produced a jury verdict and five appellate rulings and will not be finally resolved for at least three more years.

This year's developments have their roots in a 1986 pre-trial appellate court decision limiting the issues available for trial. The US Court of Appeals for the Third Circuit held that the Federal Cigarette Labeling and Advertising Act of 1965, which first required health warnings on cigarette packages, implicitly preempted claims based on the industry's post-1965 communicative conduct, including not only its failure to adequately warn consumers but also its active deceptions.[24]

The case went to trial on other issues in 1988, resulting in a $400 000 verdict for the husband on a finding that Liggett had made deceptive health claims about Chesterfield cigarettes before 1966. The jury also found that Liggett failed to warn of the dangers before 1966, but it found for the defendant on that point since it held Rose Cipollone 80% responsible for her death. This strong victim blaming response may have been due to the fact that, while the plaintiff's attorneys were precluded by pre-emption from discussing the industry's post-1965 efforts to undermine the message on the warning labels, the defendants were permitted free rein to argue the plaintiff's fault in ignoring these warnings. Furthermore, the trial judge did not let the jury consider the

legal theory that defendants should be held responsible if the risks of smoking outweighed the benefits, since he believed that legal theory had been retroactively abolished by an industry inspired 1987 New Jersey statute. Both sides appealed.

In January 1990 the US Court of Appeals for the Third Circuit reaffirmed its 1986 pre-emption ruling, but it held that it had been unfair to permit the defendants to argue that Rose Cipollone was at fault in continuing to smoke in the face of the warnings, while forbidding her attorney to discuss the industry's communicative misbehaviour and the effect which that had on her own conduct. It concluded that on retrial neither side should be permitted to discuss the effect of the warnings. The court also held that the 1986 statute did not prevent the jury from considering the plaintiff's risk–benefit claims, and it further ordered that Liggett be given the chance at a new trial to prove that Rose Cipollone had not believed its deceptive health claims.[25]

Before the case could be retried, however, it took a very significant detour. Between 1986 and 1989 the Third Circuit's pre-emption ruling was followed by similar rulings from four other US courts of appeals and numerous lower courts. The conventional wisdom among lawyers on both sides was that the issue was settled and would never reach the US Supreme Court. But in July 1990 the New Jersey Supreme Court ruled that the Federal Cigarette Labeling and Advertising Act had no pre-emptive effect on product liability suits.[26] Building on this conflict of legal opinion, the Cipollones' attorney filed a *certiorari* petition in December 1990 seeking review of the pre-emption issue by the US Supreme Court.

In March 1991 the Supreme Court agreed to review the case. When the plaintiff's brief was submitted in May it was supported by eight friend-of-the-court briefs. Four of the briefs were sponsored by public health groups, including the American Cancer Society, American College of Cardiology, American Heart Association, American Lung Association, American Public Health Association, American College of Chest Physicians, American Council on Science and Health, American Medical Association, and the six living former Surgeons General of the United States.[27] The case was argued to eight justices of the Supreme Court in October; when the ninth justice was appointed, the Court docketed the case for reargument, suggesting the judges were either evenly split on at least one of the two main issues or wanted further clarification.

The case was reargued in January 1992, with Harvard Law Professor Laurence Tribe, perhaps the leading American constitutional scholar, this time presenting the case for the plaintiff. He pointed out that the language of the act contained no references to tort suits, and that the states therefore would have had no warning that they were losing their powers to use this mechanism to compensate injured citizens and to pressure cigarette companies to warn of newly discovered dangers. He also argued that the legal rules the companies allegedly violated, such as the obligations not to lie to consumers and to inform them of newly discovered dangers, long predate any problems with cigarettes and hence are not covered by a provision pre-empting any "requirement or prohibition based on smoking and health."[28] Two of the justices who had expressed doubts about the plaintiff's position during the first argument appeared to have resolved them in the plaintiff's favour during the interim.

The counsel for the cigarette companies, on his turn, responded to one justice's inquiry whether the court could pre-empt failure-to-warn claims while permitting claims based on deliberate deception to proceed, by reiterating his earlier position that the act pre-empts all claims based on the companies' alleged communicative misbehaviour. A decision is expected before July 1992.

A decision upholding the appellate court's pre-emption decision would still permit *Cipollone* to be retried, but would discourage most lawyers from bringing new cases. A split decision, holding failure to warn claims pre-empted but permitting deliberate deception claims to go forward, is quite possible. Such a decision would allow plaintiffs to introduce their most potent evidence, that the industry through its advertising and other promotions was deliberately undermining the public's appreciation of the warning labels, and could therefore be expected to lead to a gradual increase in claims. A complete victory for the plaintiff, upholding the New Jersey Supreme Court's conclusion that no product liability claims are pre-empted, would attract tremendous attention to this type of litigation and would likely induce the filing of many claims against cigarette companies throughout the United States.[29]

Conclusion

As the six cases discussed here illustrate, tobacco litigation has become a major front in the war between public health forces and the tobacco industry. The front is expanding in unanticipated directions as new opportunities to take enemy territory appear. In the past year the public health forces achieved two significant victories (*AFCO* and *Kyte*), opened a new line of attack (*Broin*), and kept alive the possibility of a product liability victory (*Cipollone*); however, the industry won a major victory, probably temporary but still important (*RJR-MacDonald*), and thwarted a worrisome foray by the public health forces (*Ierardi*). Like the other fronts in the fight against the pandemic of tobacco induced diseases and the industry that propagates it, the litigation front needs to be watched, defended, and supplied.

1 For example, US Public Health Service. *Smoking and health. Report of the Advisory Committee to the Surgeon General of the Public Health Service.* Washington, DC: US Public Health Service, 1964.
2 For example, *JAMA* 1991; **266** (22) (11 December, 1991): the issue is devoted to tobacco control.

3 RJ Reynolds Tobacco Co. Smoking in public: let's separate fact from fiction. *Parade Magazine* 1984 April 15.
4 In the Matter of RJ Reynolds Tobacco Co, *Tobacco Products Litigation Reporter* 1990; **5** (3): 8.15.
5 Chapman S, Woodward S. Passive smoking causes lung cancer, asthma attacks, and respiratory disease. In Everingham R, Woodward, S, eds. *Tobacco litigation. AFCO v TIA: the case against passive smoking*. Sydney: Legal Books, 1991: 10–4.
6 The February 7 ruling appears both in R Everingham and S Woodward, eds. *Tobacco litigation. The case against passive smoking*, 1991: 26–123, and in AFCO *v* TIA, *Tobacco Products Litigation Reporter* 1991; **6** (1A): 2.77–2.293; the restraining order appears in R Everingham and S Woodward, eds, pp 124–9.
7 Negri G. Australian Court ruling called impetus for mass antismoking lobby. *Boston Globe* 1991 July 25: 20.
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Translations of abstract

Evolutions rècentes des procès liés au tabac: 1991

Richard A Daynard

Résumé

Les procès ont pris une part importante dans le conflit qui oppose les groupes de prévention du tabagisme et l'industrie du tabac. En 1991, d'important développements dans six procès sur le tabac sont intervenus.

Un juge australien a jugé que l'affirmation de l'industrie du tabac selon laquelle n'est pas prouvé que la fumée de tabac ambiante provoque diverses maladies était incorrecte et trompeuse.

Une chaîne de magasins américaine a accepté de ne vendre des produits du tabac aux jeunes que sur présentation d'une pièce d'identité attestant leur âge.

Un juge Québécois a jugé que la loi canadienne qui interdit la publicité pour les produits du tabac était inconstitutionnelle. Les employés d'une compagnie aérienne dont la santé était menacée par la fumée de tabac ambiante ont intenté un procès pour responsabilité du fait des produits contre les compagnies de tabac.

Un autre procès pour responsabilité du fait des produits, dans lequel le plaignant affirme que l'amiante contenue dans le filtre de la cigarette est la cause de sa tumeur au poumon, s'est terminé sur un non lieu. Finalement, la Cour Suprême des Etats-Unis se prépare à juger un cas d'une importance fondamentale pour la viabilité des procès pour responsabilité du fait des produits du tabac aux Etats-Unis.

Ces cas illustrent la variété et l'importance des conflits touchant à la prévention du tabagisme qui arrivent maintenant devant les tribunaux.

Acontecimientos recientes en los litigios sobre el tabaco: 1991

Richard A Daynard

Resumen

Los litigios se han convertido en un frente importante en el conflicto entre la industria tabacalera y las fuerzas que tratan de controlar su consumo. En 1991 ocurrieron acontecimientos importantes en seis juicios muy diferentes relacionados con el tabaco. Un juez australiano dictaminó que, los alegatos de la industria del tabaco de que no se ha probado que el humo de tabaco ambiental sea causante de una variedad de enfermedades, son falsos y equívocos. Una cadena de tiendas de Estados Unidos aceptó exigir un documento para comprobar la edad antes de vender productos de tabaco a los jóvenes. Un juez de Quebec dictaminó que la ley canadiense que prohibe la publicidad sobre tabaco es inconstitucional. Un juicio contra la responsabilidad del producto fue entablado contra una fábrica de cigarrillos por sobrecargos de una línea aérea cuya salud fue perjudicada por la exposición al humo de tabaco ambiental. Otro juicio sobre reponsabilidad del producto, que acusaba al asbesto contenido en un filtro de cigarrillos como causa de un mesotelioma sufrido por el demandante, terminó sin un fallo concluyente. Finalmente, la Corte Suprema de Estados Unidos se preparaba para decidir un problema legal de importancia crítica para la viabilidad de los casos de responsabilidad de los productos de tabaco en los Estados Unidos. Estos juicios ilustran el rango e importancia de los problemas de control del tabaquismo que ahora manejan los tribunales.

烟草诉讼的发展（1991）

西蒙·差普曼

烟草诉讼已成为烟草控制力量与烟草工业之间斗争的焦点。1991年六个性质截然不同的、与烟草有关的诉讼案有了重大进展。一位澳大利亚法官裁定烟草工业声称的被动吸烟造成了各种疾病没有证据的说法是虚假的和骗人的。美国的方便连锁店同意在向青少年售烟时要求证明年龄。魁北克一位法官裁定加拿大禁止烟草广告的法律是违反宪法的。在一个产品责任诉讼案中，空中小姐指控卷烟生产者，环境中的烟草烟雾损害了她们的健康。另一个产品责任诉讼案指控卷烟过滤嘴中的砷引起原告间皮瘤的发生，该案最终不了了之。美国最高法院准备就烟草产品责任诉讼案的可行性做出重要的决定。这些案例说明法院已越来越多的考虑烟草控制中所面临的法律问题。（中国健康教育研究所烟草控制研究室　潘学雷　译）